Muhamad Athif Izuddin bin Rosle v Malaysia Airport Sdn Bhd & Anor

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO PA-25-24–07 OF 2022
ANAND PONNUDURAI J
22 MARCH 2023

Civil Procedure — Judicial review — Certiorari — Dismissal from service — Employee's urine test showed presence of drugs in employee's urine — No criminal prosecution against employee — Employee was suspended and dismissed from service by employer — Industrial Court found employee's dismissal was for just cause or excuse — Whether court could disturb Industrial Court's finding of fact which was made based on credibility of witness — Whether there was break in chain of identification of employee's urine sample — Whether urine was tested in accordance with Ministry of Health of Malaysia guidelines — Whether award by Industrial Court tainted by error of law or irrationality — Courts of Judicature Act 1964 s 25 — Industrial Relations Act 1967 s 20(3) — Rules of Court 2012 O 53

Prior to his dismissal, the applicant was an aviation safety assistant of the first respondent. The applicant was suspended from his service when the first respondent discovered that the urine test conducted by the Royal Malaysia Police ('the PDRM') against the applicant showed the presence of amphetamine and methamphetamine in the applicant's urine. Nevertheless, there was no charge preferred against the applicant by the prosecutor in relation to the urine test. Based on the positive urine test result, the first respondent had served a show cause notice to the applicant and after considering the applicant's reply to the said notice, the first respondent decided to terminate the applicant's employment with immediate effect. The matter was referred to the Industrial Court and at the end of the trial, the Industrial Court dismissed the applicant's claim after concluding that his dismissal was for just cause or excuse ('the award'). The learned Chairman of the Industrial Court found, inter alia, that: (a) there was no break in the chain of identification of the urine sample obtained; (b) the applicant's version that he took cough syrup and herbal medicine the day before could not be accepted; (c) the applicant's complaint that there was no prosecution by the police was not relevant because a dismissal was not affected by any criminal prosecution or outcome; and (d) the offence was a serious one warranting dismissal. Aggrieved by the decision of the Industrial Court, the applicant filed the present judicial review application seeking an order of certiorari to quash the Industrial Court's award. The issues arose were: (i) whether there was a break in the chain of identification of the urine sample of the applicant ('the first issue'); and (ii) whether the urine was

tested in accordance with the Ministry of Health of Malaysia guidelines ('the second issue') — in relation to this issue, the applicant argued that these guidelines were not adhered to in that the screening of the urine sample was not done within seven days but more than a year later and that the said urine sample was not stored in frozen form.

Held, dismissing the application with costs of RM5,000 subject to allocator:

(1) It was settled law that in a judicial review application pursuant to O 53 of the Rules of Court 2012 and s 25 of the Courts of Judicature Act 1964, the High Court may consider if there was any unfair procedure, irrationality or whether the Industrial Court Chairman had taken into account irrelevant considerations or failed to take into account relevant considerations. The decision in respect of the first respondent's exercise of the executive function under s 20(3) of the Industrial Relations Act 1967 may be reviewed by the High Court on grounds of illegality, irrationality, procedural impropriety, or disproportionality. As such, the High Court was now permitted to consider the substance as well as the process (see para 6).

(2) Having considered the documentary evidence as well as the testimony of the witnesses before the Industrial Court, the court was of the view that the Industrial Court Chairman had the benefit to assess the credibility as well as the demeanor of all the witnesses that testified before the Industrial Court. The learned chairman of the Industrial Court had made findings of facts based on the witnesses he saw and heard and the court could not conclude that such a finding was irrational. This was analogous to the principle that a reviewing court would not, generally intervene unless the trial court was shown to be plainly wrong in arriving at its decision, ie, there had been no or insufficient judicial appreciation of the evidence. The court could not disturb findings of facts based on credibility of witnesses (see para 14).

(3) Based on the collective evidence of COW1 who had conducted the preliminary tests on the applicant's urine and COW4, the biochemist, there was clearly sufficient evidence before the Industrial Court to conclude that there was no break in the chain of the collection of the urine sample at the Penang International Airport on 12 October 2017, its movement from the Penang International Airport to the investigating officer in the Narcotics Department in IPD Barat Daya, Pulau Pinang, and the subsequent transfer from the police station to the Kepala Batas Hospital and until the lab test/analysis was conducted by the biochemist, COW4 on 22 October 2018. It was certainly proven on a balance of probabilities that the urine sample tested was indeed that of the applicant. The applicant had in fact admitted during cross-examination

that the urine sample in the bottle that was analysed was his urine sample. The court therefore answered the first issue in the negative (see paras 17–19).

(4) The court answered the second issue in the negative. As testified by several witnesses including COW4, the urine sample of the applicant remained positive for drug abuse. The result remained the same and unaffected even after a year after the said analysis/test was conducted by COW4. COW4 had testified that there was no breach of the guidelines and that whilst best to be stored frozen, if there was no freezer, the urine sample could be kept in a fridge at a temperature between 2–8 degrees Celsius as was done in this case and that keeping the urine sample as such maintained the integrity of the same. The applicant did not produce any witness or expert to contradict this evidence, as such, the learned Chairman of the Industrial Court could not be faulted for accepting such evidence. Further, the learned Chairman of the Industrial Court found COW4 a credible witness and it was trite law that such findings of facts based on credibility could not be challenged (see paras 31–32).

(5) Bearing in mind the nature of the applicant's duties and the express terms of the collective agreement, the court found that the first respondent's decision to terminate the applicant's services upon receiving the letter from the police and the urine test report could certainly be considered as a course of action any reasonable employer would have taken. Surely there was no incumbent duty on the employer to go behind the scenes and to conduct its own investigations as to the chain of the urine sample and the analysis done etc. Based on the evidence adduced before the Industrial Court, the court could not conclude that the award was tainted by any error of law or irrationality. As such, the court found no merits in the present application to quash the said award (see paras 33, 35 & 37).

[Bahasa Malaysia summary

Sebelum dipecat, pemohon merupakan pembantu keselamatan penerbangan responden pertama. Pemohon telah digantung perkhidmatannya apabila responden pertama mendapati ujian air kencing yang dijalankan oleh Polis Diraja Malaysia ('PDRM') terhadap pemohon menunjukkan kehadiran amphetamine dan methamphetamine dalam air kencing pemohon. Namun begitu, tiada pertuduhan dikenakan terhadap pemohon oleh pihak pendakwa raya berhubung dengan ujian air kencing tersebut. Berdasarkan keputusan ujian air kencing yang positif itu, responden pertama telah menyerahkan notis tunjuk sebab kepada pemohon dan selepas mempertimbangkan jawapan pemohon kepada notis tersebut, responden pertama memutuskan untuk menamatkan pekerjaan pemohon berkuat kuasa serta-merta. Perkara tersebut dirujuk ke Mahkamah Perusahaan dan pada akhir perbicaraan, Mahkamah Perusahaan menolak tuntutan pemohon selepas membuat kesimpulan bahawa pemecatannya adalah atas sebab atau alasan yang adil ('award tersebut').

Pengerusi Mahkamah Perusahaan yang bijaksana mendapati, antara lain, bahawa: (a) tiada putusnya rantaian pengecaman sampel air kencing yang diperolehi; (b) versi pemohon bahawa dia mengambil ubat batuk dan ubat herba sehari sebelumnya tidak boleh diterima; (c) aduan pemohon bahawa tiada pendakwaan oleh polis adalah tidak relevan kerana pemecatan tidak terjejas oleh apa-apa pendakwaan jenayah atau keputusan; dan (d) kesalahan tersebut adalah kesalahan serius yang memerlukan pemecatan. Terkilan dengan keputusan Mahkamah Perusahaan, pemohon memfailkan permohonan semakan kehakiman semasa untuk mendapatkan perintah certiorari untuk membatalkan award Mahkamah Perusahaan. Isu-isu yang timbul ialah: (i) sama ada terdapat putusnya rantaian pengecaman sampel air kencing pemohon ('isu pertama'); dan (ii) sama ada air kencing telah diuji mengikut garis panduan Kementerian Kesihatan Malaysia ('isu kedua') — berhubung isu ini, pemohon berhujah bahawa garis panduan ini tidak dipatuhi kerana saringan sampel air kencing tidak dilakukan dalam tempoh tujuh hari tetapi lebih daripada setahun kemudian dan sampel air kencing tersebut tidak disimpan dalam bentuk beku.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000 tertakluk kepada alokator:

(1) Sudah menjadi undang-undang yang mantap bahawa dalam permohonan semakan kehakiman menurut A 53 Kaedah-Kaedah Mahkamah 2012 dan s 25 Akta Mahkamah Kehakiman 1964, Mahkamah Tinggi boleh mempertimbangkan jika terdapat apa-apa prosedur yang tidak adil, tidak rasional atau sama ada Pengerusi Mahkamah Perusahaan telah mengambil kira pertimbangan yang tidak relevan atau gagal mengambil kira pertimbangan yang relevan. Keputusan berkenaan dengan penjalanan fungsi eksekutif responden pertama di bawah s 20(3) Akta Perhubungan Perusahaan 1967 boleh disemak oleh Mahkamah Tinggi atas alasan-alasan menyalahi undang-undang, tidak rasional, ketidakaturan prosedur, atau tidak setimpal. Oleh itu, Mahkamah Tinggi kini dibenarkan untuk mempertimbangkan kandungan serta prosesnya (lihat perenggan 6).

(2) Setelah mempertimbangkan keterangan dokumen serta keterangan saksi-saksi di hadapan Mahkamah Perusahaan, mahkamah berpendapat Pengerusi Mahkamah Perusahaan mempunyai kelebihan untuk menilai kredibiliti serta gelagat semua saksi yang memberi keterangan di hadapan Mahkamah Perusahaan. Pengerusi Mahkamah Perusahaan yang bijaksana telah membuat penemuan fakta berdasarkan saksi-saksi yang dilihat dan didengarinya dan mahkamah tidak dapat membuat kesimpulan bahawa dapatan sedemikian adalah tidak rasional. Ini adalah serupa dengan prinsip bahawa mahkamah yang menyemak tidak akan, secara amnya campur tangan melainkan mahkamah perbicaraan terbukti secara jelas salah dalam membuat keputusan, iaitu, tiada atau tidak

cukup penghayatan kehakiman terhadap keterangan. Mahkamah tidak boleh mengganggu penemuan fakta berdasarkan kredibiliti saksi (lihat perenggan 14).

(3) Berdasarkan keterangan kolektif COW1 yang telah menjalankan ujian awal ke atas air kencing pemohon dan COW4, ahli biokimia, terdapat keterangan yang cukup jelas di hadapan Mahkamah Perusahaan untuk membuat kesimpulan bahawa tiada putusnya rantai pengumpulan sampel air kencing tersebut di Lapangan Terbang Antarabangsa Pulau Pinang pada 12 Oktober 2017, pergerakannya dari Lapangan Terbang Antarabangsa Pulau Pinang kepada pegawai penyiasat di Jabatan Narkotik di IPD Barat Daya, Pulau Pinang, dan seterusnya pemindahan dari balai polis ke Hospital Kepala Batas dan sehingga ujian/analisis makmal dijalankan oleh ahli biokimia, COW4 pada 22 Oktober 2018. Adalah terbukti berdasarkan imbangan kebarangkalian bahawa sampel air kencing yang diuji adalah milik pemohon. Malahan, pemohon sendiri telah mengakui semasa pemeriksaan balas bahawa sampel air kencing dalam botol yang dianalisis adalah sampel air kencingnya. Oleh itu mahkamah menjawab isu pertama secara negatif (lihat perenggan 17–19).

(4) Mahkamah menjawab isu kedua secara negatif. Seperti yang dinyatakan oleh beberapa saksi termasuk COW4, sampel air kencing pemohon kekal positif penyalahgunaan dadah. Keputusannya kekal sama dan tidak terjejas walaupun selepas setahun analisis/ujian tersebut dijalankan oleh COW4. COW4 telah memberi keterangan bahawa tiada pelanggaran garis panduan dan walaupun yang terbaik sampel air kencing tersebut disimpan dalam keadaan beku, jika tiada peti sejuk beku, sampel air kencing boleh disimpan di dalam peti sejuk pada suhu antara 2–8 darjah Celsius seperti yang dilakukan dalam kes ini dan menyimpan sampel air kencing dengan cara demikian mengekalkan integriti sampel tersebut. Pemohon tidak mengemukakan mana-mana saksi atau pakar untuk menyanggah keterangan ini, oleh itu, Pengerusi Mahkamah Perusahaan yang bijaksana tidak boleh dipersalahkan kerana menerima keterangan tersebut. Selanjutnya, Pengerusi Mahkamah Perusahaan yang bijaksana mendapati COW4 merupakan seorang saksi yang boleh dipercayai dan telah menjadi undang-undang yang mantap bahawa penemuan fakta berdasarkan kredibiliti tidak boleh dicabar (lihat perenggan 31–32).

(5) Mengambil kira jenis tugas pemohon dan syarat nyata perjanjian kolektif, mahkamah mendapati bahawa keputusan responden pertama untuk menamatkan perkhidmatan pemohon setelah menerima surat daripada polis dan laporan ujian air kencing sudah tentu boleh dianggap sebagai suatu tindakan yang akan diambil oleh mana-mana majikan yang munasabah. Sememangnya tidak ada kewajipan ke atas majikan untuk pergi ke belakang tabir dan menjalankan penyiasatan sendiri mengenai

rantaian sampel air kencing dan analisis yang dilakukan dan lain-lain. Berdasarkan keterangan yang dikemukakan di hadapan Mahkamah Perusahaan, mahkamah tidak dapat membuat kesimpulan bahawa award tersebut dicemari oleh apa-apa kekhilafan undang-undang atau tidak rasional. Oleh itu, mahkamah mendapati tiada merit dalam permohonan semasa bagi membatalkan award tersebut (lihat perenggan 33, 35 & 37).]

Cases referred to

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
Noor Shariful Rizal bin Noor Zawawi v PP [2017] 3 MLJ 460, CA (refd)
Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors [2021] 3 MLJ 622, FC (refd)
Pendakwa Raya lwn Mohd Rithaudin bin Mohd Ali [2018] MLJU 1953, HC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
The United States of America v Menteri Sumber Manusia & Ors and another appeal [2022] 4 MLJ 589, FC (refd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 25
Industrial Relations Act 1967 s 20(3)
Rules of Court 2012 O 53

Habib Rahman (with Nurfairuz) (EzriLaw Firm) for the applicant.
Raymond TC Low (with Benedict Ngoh) (Shearn Delamore & Co) for the first respondent.

Anand Ponnudurai J:

INTRODUCTION

[1] This is a judicial review application by the applicant for an order of certiorari to quash Industrial Court Award No 615 of 2022 dated 6 April 2022 which had concluded after a full trial that the dismissal of the applicant from the first respondent's services on 27 August 2019 was with just cause or excuse.

[2] Having heard the submissions of learned counsel for both parties and after having read all the written submissions, I had dismissed the application with costs. I will now provide the detailed grounds for dismissing the application by first setting forth the salient facts of this case, the respective parties' contentions and my analysis/conclusion as to why there were no merits in the application.

SALIENT FACTS

[3] The facts leading to this present claim can be succinctly summarised as follows:

(a) prior to his dismissal, the applicant was an Aviation Safety Assistant ('Pembantu Keselamatan Penerbangan') of the first respondent since 11 April 2014;

(b) on 12 October 2017, the Royal Malaysia Police ('PDRM') conducted a urine drug test against the applicant and the applicant was thereafter arrested by the police officers on the same day on the grounds that the urine drug test result confirmed the presence of amphetamine and methamphetamine;

(c) consequently, the first respondent suspended the applicant from his workplace effective 24 October 2017 pending further action by the PDRM;

(d) on 2 August 2019, upon a reference made to the Deputy Public Prosecutor, the PDRM released the applicant from any charges proffered against him. No criminal charges have been preferred against the applicant to date;

(e) on 16 August 2019, the first respondent served a show cause notice on the applicant which the applicant reverted on 21 August 2019;

(f) vide a letter dated 27 August 2019, the first respondent terminated the applicant's employment with immediate effect;

(g) the applicant's representation for reinstatement was then referred to the Industrial Court by the Honorable Minister of Human Resources;

(h) on 6 April 2022, upon conclusion of a full trial, the Industrial Court vide Award No 614 of 2022 dismissed the applicant's claim after concluding that his dismissal was for just cause or excuse ('said award');

(i) from a perusal of the said award, the following can be gleaned:

(i) the first respondent had produced five witnesses including the police officers and lab testing personnel as well as their industrial relations manager;

(ii) the learned chairman of the Industrial Court set out the relevant law and correctly held that the burden of proof was on the first respondent to justify the dismissal of the applicant;

(iii) the learned chairman of the Industrial Court remarked that he has heard the witnesses and concludes as a finding of fact at para 26 that based on the testimony of witnesses, there was no break in the chain of identification of the urine sample obtained;

(iv) the learned chairman of the Industrial Court considered the applicant's version that he took cough syrup and herbal medicine the day before but does not accept such version;

(v) in so far as the applicant's complaint that there was no prosecution by the police, he correctly opines that it is not relevant as a dismissal is not affected by any criminal prosecution or outcome and there is no need to await any such outcome; and

(vi) that the offence was a serious one warranting dismissal, especially considering that the applicant himself was responsible for security matters at the Penang Airport.

(j) dissatisfied with the decision of the Industrial Court, the applicant commenced this present judicial review application against the respondents.

THE APPLICANT'S CONTENTIONS

[4] The applicant's contentions can be condensed into two main issues as follows:

(a) whether there was a break in the chain of identification of the urine sample of the applicant; and

(b) whether the urine was tested in accordance with the Ministry of Health of Malaysia ('KKM') guidelines.

THE FIRST RESPONDENT'S CONTENTIONS

[5] The first respondent's contentions are also briefly summarised as follows:

(a) the Industrial Court had taken into consideration all relevant matters, had not erred in law and had acted within its jurisdiction in arriving at the said award;

(b) the first respondent had successfully established the charge of misconduct against the applicant when the results of the urine sample

indicated positive for amphetamine and methamphetamine which clearly breached the company policies;

(c) the sample urine was collected from the applicant at the Penang International Airport and a preliminary test was conducted on the applicant's urine sample which confirmed the presence of illegal drug substances;

(d) the Industrial Court Chairman having the benefit of assessing the demeanor and the credibility of the witnesses made a finding that there was no break in the chain of the urine sample of the applicant;

(e) the purported delay of more than one year before the applicant's urine sample was tested did not jeopardise the quality or the result of the applicant's urine sample; and

(f) the applicant had submitted separate urine samples only taken after three years to challenge the veracity of the lab analysis of his urine sample and no samples were taken by the applicant immediately after the first test taken to challenge the same.

THE APPLICABLE LAW

[6] In relation to judicial review applications, it is settled law that in a judicial review application pursuant to O 53 of the Rules of Court 2012 and s 25 of the Courts of Judicature Act 1964, the High Court may consider if there was any unfair procedure, irrationality or whether the Industrial Court Chairman had taken into account irrelevant considerations or failed to take into account relevant considerations. The decision in respect of the first respondent's exercise of the executive function under s 20(3) of the Industrial Relations Act 1967 may be reviewed by the High Court on grounds of illegality, irrationality, procedural impropriety or disproportionality. As such, the High Court is now permitted to consider the substance as well as the process (see the cases of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 and *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 and *The United States of America v Menteri Sumber Manusia & Ors and another appeal* [2022] 4 MLJ 589).

ANALYSIS

Issue 1: Whether there was a break in the chain of identification of the urine sample of the applicant

[7] There is no dispute that the first respondent as an employer had received a letter dated 14 August 2019 from the narcotics division of PDRM Penang informing that the applicant was detained and a urine test conducted which revealed it contained drugs substances (amphetamine and methamphetamine). This was the basis of the dismissal pursuant to article 17.1.4 of the 'Perjanjian Bersama Ke Tujuh di antara Malaysia Airports Holdings Berhad dengan Kesatuan Pekerja-Pekerja Malaysia Airports Berhad Semenanjung Malaysia' which expressly provides that an employee found to be involved in the abuse of drugs substances is liable to be terminated. Article 17.1.4 is reproduced below as follows:

> Artikel 17: PENAMATAN PERKHIDMATAN DAN PERLETAKAN JAWATAN
>
> 17.1 Syarikat boleh menamatkan perkhidmatan seseorang pekerja yang telah diterima bertugas disebabkan mana-mana keadaan berikut:-
>
> 17.1.1 Kesihatannya didapati tidak memuaskan selepas menjalani pemeriksaan kesihatan oleh Doktor Panel Syarikat;
>
> 17.1.2 Pekerja telah memberikan maklumat palsu ketika memohon pekerjaan;
>
> 17.1.3 Didapati mempunyai rekod jenayah seperti terlibat dengan penyalahgunaan dadah atau pernah didapati bersalah di bawah mana-mana Kanun Keseksaan;
>
> 17.1.4 Pekerja didapati terlibat dengan penyalahgunaan dadah.

[8] Learned counsel for the applicant submitted that the Industrial Court Chairman erred in arriving at his decision that there was no break in the chain of identification of the urine sample of the applicant obtained at the Penang International Airport on 12 October 2017.

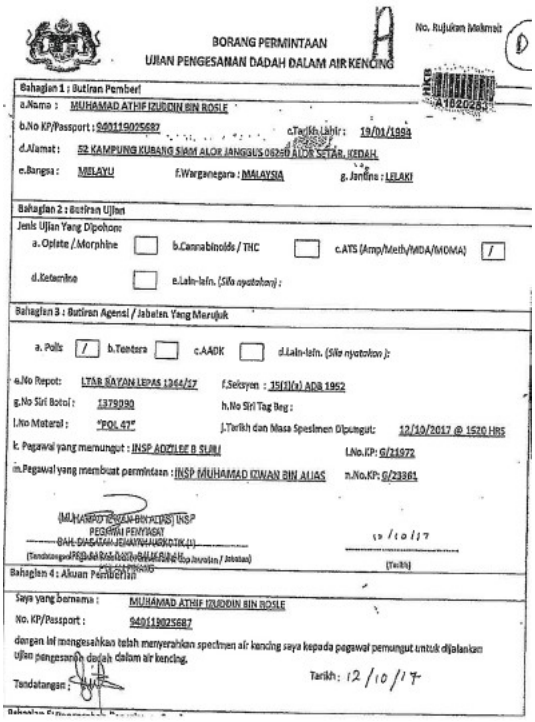
[9] Having considered the said award and the evidence in totality led before the Industrial Court, it is my considered view that there was no error committed by the learned Chairman of the Industrial Court in arriving at the conclusion he did ie that there was no break in the chain of the identification of the urine sample obtained from the applicant on 12 October 2017 at the Penang International Airport. Each of the first respondent's witnesses had testified as to the chain from the taking of the sample of the applicant at the Penang International Airport right until the analysis on the same was conducted by COW4 on 22 October 2018 and found no break in the identification of the same.

[10] From the testimony of the first respondent's witnesses, it can be deduced that the said urine samples were collected on 12 October 2017 which comes with the package having the serial number 1379090 and preliminary tests were conducted by COW1 on the applicant's urine samples by dipping five different strips which indicated positive drug substances in the said urine sample. This

was never denied by the applicant during cross-examination as he was present when the said preliminary test was conducted.

[11] There was then the arrest of the applicant and the preparation of the 'Borang Permintaan Ujian Pengesanan Dadah Dalam Air Kencing' dated 12 October 2017 where COW1 testified that the applicant confirmed the same urine sample was given to the police for further test to be conducted.

[12] It is apt to reproduce the said form as follows:



BORANG PERMINTAAN
UJIAN PENGESANAN DADAH DALAM AIR KENCING

No. Rujukan Makmal: A1020483

Bahagian 1 : Butiran Pemberi

a.Nama : MUHAMAD ATHIF IZUDDIN BIN ROSLE

b.No KP/Passport : 940119025687 c.Tarikh Lahir : 19/01/1994

d.Alamat : 52 KAMPUNG KUBANG SIAM ALOR JANGGUS 06250 ALOR SETAR, KEDAH

e.Bangsa : MELAYU f.Warganegara : MALAYSIA g. Jantina : LELAKI

Bahagian 2 : Butiran Ujian

Jenis Ujian Yang Dipohon:

a. Opiate /.Morphine [ ] b.Cannabinoids / THC [ ] c.ATS (Amp/Meth/MDA/MDMA) [/]

d.Ketamine [ ] e.Lain-lain. (Sila nyatakan) :

Bahagian 3 : Butiran Agensi / Jabatan Yang Merujuk

a. Polis [/] b.Tentera [ ] c.AADK [ ] d.Lain-lain. (Sila nyatakan):

e.No Repot: LTAR BAYAN LEPAS 1364/17 f.Seksyen : 15(1)(a) ADB 1952

g.No Siri Botol : 1379090 h.No Siri Tag Beg :

i.No Material : "POL 47" j.Tarikh dan Masa Spesimen Dipungut: 12/10/2017 @ 1520 HRS

k. Pegawai yang memungut : INSP ADZILEE B SUBI I.No.KP: G/21972

m.Pegawai yang membuat permintaan : INSP MUHAMAD IZWAN BIN ALIAS n.No.KP: G/23361

(MUHAMAD IZWAN BIN ALIAS) INSP
PEGAWAI PENYIASAT
BAH. DISIASATAN JENAYAH NARKOTIK (1)
(Tandatangan PEGAWAI PENYIASAT/PEGAWAI PENGENDALI Bagi Invoisan / Inkuiran)

12/10/17
(Tarikh)

Bahagian 4 : Akuan Pemberian

Saya yang bernama : MUHAMAD ATHIF IZUDDIN BIN ROSLE

No. KP/Passport : 940119025687

dengan ini mengesahkan telah menyerahkan spesimen air kencing saya kepada pegawai pemungut untuk dijalankan ujian pengesanan dadah dalam air kencing.

Tandatangan :

Tarikh : 12/10/17

[13] Further, the confirmation was done in compliance with part (viii) and (ix) of the Ministry of Health ('KKM') Guidelines for Testing Drugs of Abuse in Urine No 6 of 2002 which provides as follows:

> (viii) All urine samples shall be selected in the presence of the donor. Auto seal device or security seal (wax seal with departmental stamp) shall be used.
>
> (ix) The donor shall be asked to read and sign in a statement 'Akuan Pemberi' certifying that the urine sample identified as having been collected from him or her is in fact that sample he or she has provided. Refer Appendix 2 [Lampiran 2 — Borang PER (LAB)-SS 301 B].

[14] Having considered the documentary evidence before me as well as the testimony of the witnesses before the Industrial Court, I am of the view that the Industrial Court Chairman had the benefit to assess the credibility as well as the demeanor of all the witnesses that testified before the Industrial Court. The learned chairman of the Industrial Court had made findings of facts based on the witnesses he saw and heard and I cannot conclude that such a finding was irrational. This is analogous to the principle that a reviewing court will not, generally intervene unless the trial court is shown to be plainly wrong in arriving at its decision ie there has been no or insufficient judicial appreciation of the evidence (see the Federal Court cases of *Ong Leong Chiou & Anor v Keller (M) Sdn Bhd & Ors* [2021] 3 MLJ 622 and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). See also the Court of Appeal case of *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1 which enunciated the well-settled law that a court cannot utilise certiorari proceedings as a cloak to entertain what, in truth, is an appeal against findings of fact. This court cannot disturb findings of facts based on credibility of witnesses as it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.

[15] As such, from the perusal of the said award, I am of the considered view that the finding of the Industrial Court was not irrational or using the words of Lord Diplock in the case of *Council of Civil Service Unions* made with 'defiance of logic' which warrants judicial review.

[16] The applicant further contends that the said award does not reflect an adequate judicial appreciation by the learned Chairman of the Industrial Court of the issue in relation to the analysis done on the urine sample. With respect, as reiterated hereinabove, although it is not a lengthy award, I find that the learned Chairman of the Industrial Court had indeed addressed the issue of the analysis done and expressly found that COW4, a biochemist as a credible witness and accepts his analysis and further notes that the applicant had not produced any other witness to challenge COW4's finding in respect of the result of the urine samples.

[17] I find that based on the collective evidence of COW1 and COW4, there was clearly sufficient evidence before the Industrial Court to conclude that there was no break in the chain of the collection of the urine sample at the Penang International Airport on 12 October 2017, its movement from the Penang International Airport to the investigating officer in the Narcotics Department in IPD Barat Daya, Pulau Pinang, and the subsequent transfer from the police station to the Kepala Batas Hospital and until the lab test/analysis was conducted by the biochemist, COW4 on 22 October 2018. It was certainly proven on a balance of probabilities that the urine sample tested was indeed that of the applicant.

[18] In any event, when referred to the applicant during cross-examination, the applicant admitted that it was his urine sample in the very bottle that was analysed. This is further corroborated by the said form which he signed for submission to the lab for further tests/analysis.

[19] In respect of the first issue contended by the applicant, I will answer the same in the negative. At all material times, as found by the learned Chairman of the Industrial Court, there was no break in the chain of identification of the urine samples collected up until the analysis of the same in the Kepala Batas hospital. There is no evidence produced by the applicant to show otherwise.

Issue 2: Whether the urine was tested in accordance with the Ministry of Health of Malaysia ('KKM') guidelines

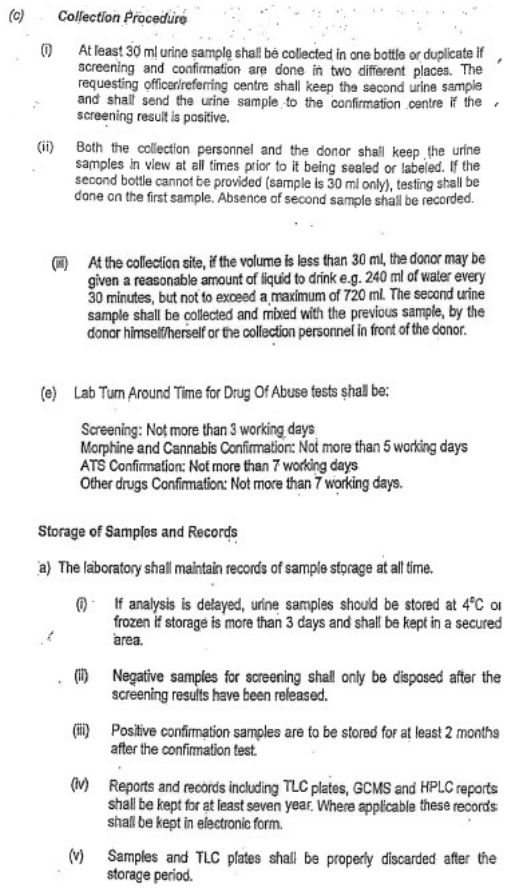
[20] The applicant contends that the first respondent had obtained the urine samples of the applicant in contravention of the Ministry of Health ('KKM') Guidelines for Testing Drugs of Abuse in Urine No 6 of 2002 on several grounds:

(a) only one urine sample was obtained from the applicant by COW1, the arresting officer;

(b) the urine sample was tested by the biochemist, COW4 after a year; and

(c) during the period of one year, the said urine sample was not stored in frozen form but stored at a normal temperature as the lab does not have a frozen facility.

[21] It is apt to reproduce paras 5(c), 13 (e) and 15 of the said guidelines as follows:



(c) *Collection Procedure*

(i) At least 30 ml urine sample shall be collected in one bottle or duplicate if screening and confirmation are done in two different places. The requesting officer/referring centre shall keep the second urine sample and shall send the urine sample to the confirmation centre if the screening result is positive.

(ii) Both the collection personnel and the donor shall keep the urine samples in view at all times prior to it being sealed or labeled. If the second bottle cannot be provided (sample is 30 ml only), testing shall be done on the first sample. Absence of second sample shall be recorded.

(iii) At the collection site, if the volume is less than 30 ml, the donor may be given a reasonable amount of liquid to drink e.g. 240 ml of water every 30 minutes, but not to exceed a maximum of 720 ml. The second urine sample shall be collected and mixed with the previous sample, by the donor himself/herself or the collection personnel in front of the donor.

(e) Lab Turn Around Time for Drug Of Abuse tests shall be:

Screening: Not more than 3 working days
Morphine and Cannabis Confirmation: Not more than 5 working days
ATS Confirmation: Not more than 7 working days
Other drugs Confirmation: Not more than 7 working days.

Storage of Samples and Records

a) The laboratory shall maintain records of sample storage at all time.

(i) If analysis is delayed, urine samples should be stored at 4°C or frozen if storage is more than 3 days and shall be kept in a secured area.

(ii) Negative samples for screening shall only be disposed after the screening results have been released.

(iii) Positive confirmation samples are to be stored for at least 2 months after the confirmation test.

(iv) Reports and records including TLC plates, GCMS and HPLC reports shall be kept for at least seven year. Where applicable these records shall be kept in electronic form.

(v) Samples and TLC plates shall be properly discarded after the storage period.

[22] Based on the above guidelines, the urine sample shall be collected in one bottle or duplicate. On the facts of this case, a single bottle was obtained instead of a duplicate.

[23] Further, the lab turnaround time for screening for drug of abuse tests shall be not more than three working days and with different days given for the categories of drugs. Paragraph 15 of the said guideline provides that the said urine sample should be stored at 4 Celsius or frozen if storage is more than three days and shall be kept in a secured area.

[24] On the facts, it is clear that COW4 conducted the test/analysed the applicant's urine sample on 22 October 2018 ie more than a year after the said urine sample was obtained on 12 October 2017. In addition, the said urine sample was never stored in a frozen area as provided by the Health Ministry Guidelines.

[25] At first blush, it would appear that the issue of the alleged contravention of Health Ministry ('KKM') Guidelines No 6 of 2002 is an arguable and meritorious contention. In this regard, reference was made to such guidelines which provide for collection procedures, screening times, testing periods as well as storage of the urine samples. These guidelines appear in exh MAI4 of the applicant's affidavit in support at p 51 which were produced at the Industrial Court.

[26] In this regard, learned counsel for the applicant has taken me through each of these issues and contends that these guidelines were not adhered to in that the screening was not done within seven days but more than a year later and that the said urine sample was not stored in frozen form.

[27] The learned counsel for the applicant in fact refers to several authorities which appear to hold that breaches of such guidelines compromise the integrity of the urine sample which casts doubts on the accuracy of the test.

[28] The applicant refers to the case of *Pendakwa Raya lwn Mohd Rithaudin bin Mohd Ali* [2018] MLJU 1953 where the learned judicial commissioner Mohd Radzi reiterated the excerpt of the Circular provided by the National Health Service, United Kingdom entitled 'Common Health Questions' as follows:

> [36] Mahkamah ini juga telah merujuk suatu lagi dokumen yang dikeluarkan oleh *National Health Service, United Kingdom atas tajuk 'Common Health Questions?* yang menyatakan seperti berikut:
>
> *Storing a urine sample until you hand it in*
>
> *If you can't hand your urine sample in within an hour. you should keep it in the fridge at around 4C (39F) for no longer than 24 hours.* Put the container of urine in a sealed plastic bag first. *The bacteria in the urine sample can multiply if it isn't kept in a fridge. If this happens, it could affect the test results.*

[29] Further, the applicant referred to the Court of Appeal case of *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460, where Zamani A Rahim JCA noted that the word 'SHALL' (hendaklah) was employed in the IGSO F103 and the KKM Guidelines Bilangan 6/2002 to indicate its mandatories.

[30] However, in my view, those cases referred to are all cases involving criminal prosecutions where it is indisputable that the burden of proof placed on the prosecution is that of beyond reasonable doubt.

[31] I have on the other hand perused the notes of evidence as appearing as exh MAI9 annexed to the applicant's supplemental affidavit and have also

considered the submissions of learned counsel for the first respondent in encl 17 and note the following was adduced as evidence at the Industrial Court:

(a) firstly, the company's witnesses testified that the guidelines were mere guidelines in place since 2002 and in any event, there was compliance with it;

(b) on the issue of the delay of more than one year to test the applicant's urine sample, such delay is not disputed. However, I note that COW4 has testified that such passage of time did not cause degradation/adversely affect the result of the urine sample. COW4 in fact testified that there can never be a case where a negative presence of drugs transforms into a positive result. This certainly makes sense. It is possible for a result of a urine sample which was originally tested positive to turn negative due to passage of time but an analysis that is positive even after a year clearly would reflect that it was positive in the first place;

(c) further, COW1 and COW4 had clearly testified and explained that there was the presence of amphetamine and methamphetamine in the applicant's urine sample. The test result did not vary nor were affected despite not being stored in a frozen area; and

(d) on the issue of the urine sample not being frozen, I further note that COW4 had testified that there was no breach of the guidelines and that whilst best to be stored frozen, if there is no freezer, the urine sample can be kept in a fridge at a temperature between 2–8 degrees Celsius as was done in this case and that keeping the urine sample as such maintains the integrity of the same. As highlighted earlier, the applicant did not produce any witness or expert to contradict the above and as such, in my considered view, the learned Chairman of the Industrial Court cannot be faulted for accepting such evidence. Further, the learned Chairman of the Industrial Court found COW4 a credible witness and it is trite law that such findings of facts based on credibility cannot be challenged.

[32] As such, having considered the above, I would answer the second issue in the negative. As testified by several witnesses including COW4, the urine sample of the applicant remained positive for drug abuse. The result remained the same and unaffected even after a year after the said analysis/test was conducted by COW4.

CONCLUSION

[33] As such, based on all matters, and upon a careful and judicious consideration of the evidence before me and the submission of learned counsel, I cannot conclude that based on the evidence adduced before the Industrial Court, the award dated 22 April 2022 can be said to be tainted by any error of law or irrationality as contended by the applicant.

[34] With due respect to learned counsel for the applicant, this present judicial review application seems to be argued as if it was a criminal case where clearly the standard of proof required and the application of the law is different. In a case like this, one has to adjudge the conduct of the employer and consider if the decision to dismiss the applicant was reasonable and with just cause or excuse at the time of the dismissal.

[35] In my considered view, bearing in mind the nature of the applicant's duties and the express terms of the collective agreement, the first respondent's decision to terminate the applicant's services upon receiving the letter from the police and the urine test report can certainly be considered as a course of action any reasonable employer would have taken. Surely there is no incumbent duty on the employer to go behind the scenes and to conduct its own investigations as to the chain of the urine sample and the analysis done etc.

[36] If at all, having known that a urine sample was taken from the applicant at the Penang International Airport on 12 October 2017 to screen for drugs, it would have been prudent for the applicant to have undertaken his own separate test at another clinic soon thereafter if he was not on drugs as opposed to taking one several years later on 4 March 2021. In this regard, I agree that his attempt to tender a lab report testing negative for the same two substances dated 4 March 2021 after the commencement of the court proceedings to be of no value and futile.

[37] As such, I found no merits in the present application to quash the said award of the Industrial Court dated 6 April 2022 and dismissed the same with costs of RM5,000 subject to allocator.

Application dismissed with costs of RM5,000 subject to allocator.

Reported by Dzulqarnain Ab Fatar